

BEFORE THE  
**Federal Communications Commission**  
 WASHINGTON, DC 20554

RECEIVED

OCT 11 2000

In the Matter of )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYARCH WIRELESS, INC. AND )  
PAGING NETWORK, INC. )WT Docket No. 99-365  
File Nos. 0000053846, *et al.*  
DA 99-3028Application For Consent to Transfer of Control of )  
Paging, Narrowband PCS, and Other Licenses )**OPPOSITION TO MOTION FOR STAY PENDING RECONSIDERATION**

Arch Wireless, Inc. ("Arch"),<sup>1</sup> by its attorneys, hereby opposes the Motion for Stay Pending Reconsideration filed October 4, 2000 in the above-captioned proceeding by Metrocall, Inc. (hereinafter the "Stay Request"). Metrocall's Stay Request utterly fails to satisfy the basic legal standards for grant of a stay and must be summarily dismissed or denied.

**INTRODUCTION**

The Stay Request is another unfortunate chapter in Metrocall's fruitless efforts before the Commission to derail Paging Network, Inc.'s ("PageNet") successful emergence from bankruptcy as an integral part of Arch. Metrocall's efforts at the Commission began on September 12, 2000, when Metrocall filed a Petition for Reconsideration or Informal Complaint (the "Petition") challenging, in a grossly untimely fashion, the Wireless Telecommunications Bureau's ("Bureau") April 25, 2000 order granting applications for transfer of control ("transfer applications") of PageNet in connection with its proposed merger (the "Merger") with Arch.<sup>2</sup>

<sup>1</sup> Effective September 25, 2000, Arch Communications Group, Inc. changed its name to "Arch Wireless, Inc." The Commission was notified of this name change by Administrative Updates submitted to the Commission on October 3, 2000.

<sup>2</sup> *Arch Communications Group, Inc. and Paging Network, Inc. For Consent to Transfer Control of Paging, Narrowband PCS, and Other Licenses*, Memorandum Opinion and Order,

(continued...)  
 No. of Copies 100  
 List ABCDE

014

The Petition requested that the Commission rescind its grant of the transfer applications and return the applications to pending status.<sup>3</sup>

On September 22, 2000, in separate pleadings opposing the Petition and Supplement,<sup>4</sup> Arch and PageNet demonstrated that the Petition and Supplement were time-barred by Sections 402 and 405 of the Communications Act of 1934, as amended (the “Act”), and the Commission’s rules promulgated thereunder, and, that in any event, the pleadings had no basis in law or fact. Even Metrocall’s efforts to cast its filings as an “informal complaint” could not remedy the fatal flaws of its Petition and Supplement. In sum, the relief sought by Metrocall *could not* be provided nearly four months after the *Order* granting the Arch/PageNet transfer applications became final. Rather, it appeared that the Petition was frivolously designed to create confusion among PageNet’s creditors and to disrupt PageNet’s pending bankruptcy, to Metrocall’s own advantage.<sup>5</sup>

---

<sup>2</sup> (...continued)

DA 00-925, 2000 FCC LEXIS 2161 (rel. Apr. 25, 2000) (“*Order*”).

<sup>3</sup> Metrocall alleges that Arch has undergone an unlawful transfer of control of certain SMR licenses currently held by PageNet to certain lenders who are party to the PageNet plan of reorganization. See Metrocall Petition, Summary. On September 18, 2000, Metrocall filed a “Supplement to Petition for Reconsideration or Informal Complaint” (“Supplement”).

<sup>4</sup> See Arch Communications Group, Inc. Opposition to Petition for Reconsideration or Informal Complaint at 2-13 (filed Sept. 22, 2000); Paging Network, Inc. Motion to Dismiss at 1-9 (filed Sept. 22, 2000).

<sup>5</sup> As discussed in previous filings, PageNet filed a plan of reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code seeking to implement the Merger. *In re Paging Network, Inc., et al.*, Case No. 00-03098 (Bankr. DE). At the time Metrocall filed its Petition and Supplement, Metrocall was also seeking authority from the Bankruptcy Court to submit an alternative plan under which it would acquire PageNet, and hoped, by its Petition and Supplement, to create doubt in the minds of the creditors in the bankruptcy proceeding as to whether the Arch/PageNet merger could be timely consummated. PageNet Motion to Dismiss at 1-3; Arch Opposition at 10-12. As discussed below, however, Metrocall’s efforts to submit a  
(continued...)

Metrocall here continues its efforts by erroneously asserting that since the Petition raised “serious issues concerning possible violations of the Act and the FCC’s Rules,”<sup>6</sup> a stay of the final grant is appropriate to enable the Commission to resolve such issues *prior* to the consummation of the proposed merger. Metrocall’s attempt to “bootstrap” a meritless pleading into an extraordinary injunction fails to satisfy even the basic legal standards for grant of a stay and must be summarily dismissed.

# **I. THE STAY REQUEST MAKES NO EFFORT TO MEET THE NECESSARY LEGAL STANDARDS**

In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass’n v. FPC*, as modified in *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*<sup>7</sup> Under that test, a petitioner must demonstrate that: (1) it is likely to succeed on the merits on appeal; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested

---

<sup>5</sup> (...continued)  
competing bid in the Bankruptcy Court have been entirely rejected by that Court.

<sup>6</sup> Stay Request at 6.

<sup>7</sup> *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

parties; and (4) a stay would serve the public interest.<sup>8</sup> “A Petitioner should meet each of these tests in order for the Commission to grant a stay.”<sup>9</sup>

Metrocall’s Stay Request fails in all respects. Metrocall makes *no* effort to demonstrate any likelihood of success on the merits, and it also fails to show irreparable injury. Moreover, a stay would substantially harm PageNet and Arch. Finally, PageNet’s customers would clearly be adversely effected so the stay is *not* in the public interest.

**A. There is No Likelihood that Metrocall will Prevail on the Merits of the Petition and Supplement**

First and foremost, Metrocall makes no effort to demonstrate any likelihood that it will prevail on the merits of its Petition and Supplement. In fact, Metrocall initiates its pleading by suggesting that the Commission may grant a stay pending reconsideration even where a movant has *not* shown any likelihood of success on the merits.<sup>10</sup> The reason for this failure is simple - - there is no likelihood that Metrocall will prevail on the merits. Indeed, Arch and PageNet’s opposing pleadings demonstrate conclusively that the Petition and Supplement are frivolous and must be dismissed.

---

<sup>8</sup> See, e.g., *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers Low-Volume Long-Distance User, Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Order, FCC 00-249 ¶ 4 (rel. July 14, 2000); *Final Analysis Communications Services*, 13 FCC Rcd 12329, 12332 ¶ 8 (IB 1998); *National Exchange Carrier Association, Inc. 1997 Proposed Modifications to the Interstate Average Schedule Formulas*, 12 FCC Rcd 8443, 8444 ¶ 6 (CCB 1997); *Deferral of Licensing of MTA Commercial Broadband PCS*, 11 FCC Rcd 17052, 17053-54 ¶ 3 (1996).

<sup>9</sup> *Access Charge Reform*, FCC 00-249 ¶ 4.

<sup>10</sup> Petition at 5. In support of this extraordinary suggestion, Metrocall cites a case in which a stay was granted *solely* to avoid interruption of service to the public - - although obviously no similarly extraordinary situation exists here.

Arch and PageNet have demonstrated that the *Order* is final and no longer subject to administrative or judicial review, and that the Petition and Supplement are time-barred by Sections 402 and 405 of the Communications Act.<sup>11</sup> Arch and PageNet's transfer applications were granted April 25, 2000 by the Wireless Telecommunications Bureau, under delegated authority. Neither Metrocall *nor any other party* sought reconsideration by the Bureau, applied for review by the full Commission, or sought judicial review within the relevant statutory deadlines. Thus, the Bureau's approval of the merger of Arch and PageNet became final on June 5, 2000 and Metrocall's Petition and Supplement, filed September 12 and 18 respectively, are barred by statute.

Indeed, Metrocall's effort to avoid the finality of the *Order* by suggesting that grant of a stay may be appropriate "despite expiration of the formal reconsideration period" is similarly unavailing. The three cases cited by Metrocall do demonstrate the truism that while the Commission cannot rescind the grant (which is the *only* relief Metrocall requests), the Commission retains plenary power over Arch to consider any allegations made by Metrocall - - despite their lack of merit<sup>12</sup> - - after the merger is consummated and Arch actually takes control of PageNet and the SMR licenses apparently at issue. Neither PageNet nor Arch has ever

---

<sup>11</sup> See Arch's Opposition at 2-5; PageNet's Motion to Dismiss at 3-4.

<sup>12</sup> Beyond the fatal procedural deficiencies of the Petition and Supplement, Arch and PageNet demonstrated that the substantive challenge is equally devoid of merit. Both Arch and PageNet have demonstrated in their filings opposing Metrocall's Petition and Supplement the utter frivolity of Metrocall's allegation that Arch's agreement (as part of the ongoing negotiations with PageNet's creditors to achieve a consensual reorganization) to accelerate payment of a portion of the debt owed as a result of the Arch/PageNet merger - - and even to consider selling certain licenses, if necessary, to achieve liquidity to make such payment - - legally constitutes a "transfer of control" of Arch to its commercial lenders. The Stay Request contains no serious evidence to sustain its allegations, and surely not sufficient evidence that can sustain a finding of a "likelihood of success" on the merits.

disputed such authority, although the allegations are so frivolous that Arch does not seriously contemplate any concern by the Commission with the arguments raised. But these cases hardly provide precedent for the extraordinary notion that the Commission may stay the effectiveness of a grant which is no longer subject to the Commission's jurisdiction<sup>13</sup> pending consideration of an untimely petition for reconsideration. In fact, in two of the three cases, *the Commission held that it was time-barred from entertaining such untimely petitions*.<sup>14</sup>

**B. Metrocall Will Not Be Harmed in the Absence of a Stay**

Metrocall asserts that it will be irreparably harmed if a stay is not granted because it “will never have an opportunity to present its own amended plan” to the PageNet creditors in the PageNet Bankruptcy Proceeding. Of course, whether Metrocall is able to pursue the purchase of PageNet's licenses is irrelevant to the post-merger Arch's qualifications to be the transferee of those licenses. In any event, whether Metrocall's suggestion of irreparable harm ever had merit, it certainly carries no weight in light of the action of the Bankruptcy Court on October 5, 2000.

---

<sup>13</sup> Once the time for seeking review has passed, if parties did not timely seek reconsideration or judicial review, the Commission's jurisdiction over the case comes to an end, and not even Congress may set aside the Commission's final judgment. *Plaut v. Spendthrift Farm, Inc.*, 115 S.Ct. 1447, 1457 (1995).

<sup>14</sup> For example, in both the *Brandywine Main-Line Radio, Inc.* and *Central Alabama Broadcasters, Inc.* cases cited by Metrocall, where the Commission addressed the issue of petitions for reconsideration filed out-of-time, *the Commission expressly held in both cases that it was time-barred from entertaining such untimely petitions*. Consequently, *Brandywine* and *Central Alabama* do not support Commission action on either the Stay Request, Petition or Supplement. And in *Communications and Control, Inc.*, the Commission stated in a footnote that it has authority to set aside license grants made as a result of inadvertent, ministerial error. But, there has not been alleged, nor has there occurred, any type of inadvertent, ministerial error in the grant of the transfer applications. Thus, Commission authority to set aside such license grants on the basis of ministerial error is irrelevant here.

At the October 5, 2000 hearing,<sup>15</sup> the Bankruptcy Court considered Metrocall's Motion to terminate PageNet's statutory right to exclusively present a plan of reorganization to its creditors, so that Metrocall could submit a competing plan. The Bankruptcy Court denied Metrocall's Motion from the bench, determining that Metrocall was trying to achieve indirectly through an extraordinary motion what it had failed to achieve directly - - the favor of PageNet and its creditors as the chosen purchaser of PageNet's licenses.<sup>16</sup> As the Bankruptcy Court's October 5th ruling demonstrates, Metrocall has no "entitlement" to an ongoing opportunity to present to the Bankruptcy Court and PageNet's creditors its own "plan" to acquire PageNet, and so there is no need for a stay to protect such opportunity to avoid irreparable harm to Metrocall. Without irreparable harm, Metrocall's Stay Request must be dismissed.<sup>17</sup>

**C. Grant of the Stay Would Cause Substantial Harm to PageNet and Would not Serve the Public Interest**

PageNet has clearly demonstrated in its Motion to Dismiss the Petition the harm that it would suffer should Metrocall succeed in delaying the Bankruptcy's Court's consideration and approval of the merger. The uncertainties inherent in PageNet's bankruptcy status already seriously undermine PageNet's ability to market its services, retain existing customers and

---

<sup>15</sup> It should not be overlooked that Metrocall filed the Stay Request on the eve of the hearing on its motion before the Bankruptcy Court on their request for extraordinary relief before that Court.

<sup>16</sup> The Court's decision, which was read from the bench, is reflected in the Transcript from the October 5, 2000 hearing, attached hereto as Attachment A.

<sup>17</sup> "The most important of [the *Virginia Petroleum Jobbers*] factors is irreparable harm, without which other factors need not be considered." *National Exchange Carrier Association, Inc.*, 12 FCC Rcd at 8444 ¶ 6 (CCB 1997) citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985).

otherwise undertake normal commercial activities.<sup>18</sup> Any additional uncertainty about the effectiveness of the *Order* and a potential delay in the consummation of the merger with Arch which may result from grant of the Stay Request would significantly undermine PageNet's efforts to maintain its operations and continue providing service to its more than eight million customers.<sup>19</sup> By undermining PageNet's capacity to continue serving its customers, grant of the stay would directly conflict with the public interest benefits associated with PageNet's paging services.

### CONCLUSION

For the foregoing reasons, Arch respectfully requests that the Commission dismiss or deny summarily Metrocall's Motion for Stay Pending Petition for Reconsideration as well as the underling Petition for Reconsideration Or Informal Complaint and related Supplement.

Respectfully submitted,

**ARCH WIRELESS, INC.**

By: 

Kathryn A. Zachem  
Lawrence J. Movshin  
Carolyn W. Groves

Wilkinson Barker Knauer, LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037  
(202) 783-4141

Its Attorneys

Date: October 11, 2000

---

<sup>18</sup> PageNet Motion to Dismiss at 2-3.

<sup>19</sup> *Id.*



# ***Attachment A***

IN THE UNITED STATES BANKRUPTCY COURT  
IN AND FOR THE DISTRICT OF DELAWARE

IN RE: :  
PAGING NETWORK, INC., : CASE NO. 00-3098 (GMS)  
Debtors :

Wilmington, Delaware  
Thursday, October 5, 2000  
3:15 o'clock, p.m.

BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.

APPEARANCES:

YOUNG, CONAWAY, STARGATT & TAYLOR, LLP  
BY: JAMES L. PATTON, JR., and  
EDWIN J. HARRON, ESQ.

Counsel for Debtors

MAYER, BROWN & PLATT  
BY: STUART ROZEN, ESQ. and  
LAWRENCE SNIDER, ESQ.

Special Counsel to Debtors

MORRIS, NICHOLS, ARSHT & TUNNELL.  
BY: WILLIAM H. SUDELL, JR., ESQ.

-and-

Valerie J. Gunning  
Official Court Reporter

1 THE COURT: Thank you, Mr. Sabin.

2 The Court is of this mind: It does not read  
3 Section 6.2, nor did it intend anyone to prove the section  
4 to preclude the consideration by the debtor of a superior  
5 proposal. So the Court rejects the interpretation that  
6 has been advanced by Metrocall.

7 The Court has heard no evidence from  
8 Metrocall today to support its contention that the  
9 Pagenet Board has refused to consider alternate proposals  
10 from Metrocall or that, in fact, Metrocall's proposal is  
11 superior.

12 In point of fact, it would appear that  
13 Metrocall's proposal is not superior, or is not even the  
14 equivalent of the proposal that has been made by Arch.

15 It seems to me that the Court would almost  
16 have to take on the mantle of a conspiracy theorist to  
17 accept the arguments that have been advanced by Metrocall  
18 today in total rejection of the business judgment that  
19 has been advanced by the debtor and various sophisticated  
20 parties, including the Creditors Committee subsequent  
21 financing, DIP financing, who are involved. And the  
22 Court does not feel it prudent or appropriate under the  
23 circumstances and facts of this case to substitute its  
24 judgment for the judgment of others who have been engaged  
25 in this process.

1 I want to read just a short passage from the  
2 response of paging network to Metrocall's amended motion.

3 Under Section 1121(d) of the Bankruptcy Code,  
4 Pagenet's exclusive right to file and confirm a plan may  
5 only be terminated for cause.

6 There is no disagreement in the room about  
7 that.

8 Metrocall bears the burden of proving the  
9 requisite cause and that burden is especially heavy  
10 where, as here, Metrocall seeks to terminate Pagenet's  
11 exclusivity rights during its initial 120 days of this  
12 case, of the case. And there's no contention that we  
13 have exceeded the 120 days.

14 And after Pagenet has filed its plan, obtained  
15 approval of its disclosure statement and begun soliciting  
16 acceptances.

17 And in the response, the debtor cites the  
18 matter of Interco, Inc., which occurs at 137 Bankruptcy  
19 999. It's an Eastern District of Missouri 1992 case.

20 Although cause for terminating exclusivity is  
21 not defined in the Bankruptcy Code, application --  
22 applicable case law establishes that the standard for  
23 demonstrated sufficient cause is exceptionally high. In  
24 fact, only gross mismanagement by the debtor and  
25 acrimonious feuding by the debtors' principals have been

1 found to pose the types of major obstacles to a successful  
2 reorganization that are necessary to establish cause to  
3 terminate a debtor's initial exclusivity period. In re:  
4 Texaco, Inc. No such allegations have or could be made  
5 by Metrocall and indeed, they have not.

6 It strikes this Court that Metrocall is simply  
7 trying to do by indirection what it couldn't do directly.  
8 Accordingly, the motion is denied.

9 MR. PATTON: Thank you, your Honor.

10 (Court recessed at 4:40 p.m.)

11 - - -

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## CERTIFICATE OF SERVICE

I, LaVon E. Stevens, a secretary with the law firm of Wilkinson Barker Knauer, LLP, hereby certify that on this 11th day of October, 2000, I served the foregoing Opposition to Motion for Stay Pending Reconsideration upon the following via hand delivery:

Frederick M. Joyce  
Alston & Bird LLP  
601 Pennsylvania Avenue, N.W.  
North Building, 11th Floor  
Washington, D.C. 20004-2601

Judith St. Ledger-Roty  
Michael Francesconi  
James Freeman  
Kelley Drye & Warren LLP  
1200 19th Street, N.W.  
Suite 500  
Washington, D.C. 20036  
*Counsel to Paging Network, Inc.*

Thomas J. Sugrue, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 3-C207  
Washington, D.C. 20554

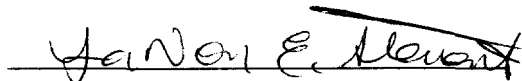
Diane Cornell  
Associate Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 3-C200  
Washington, D.C. 20554

James Schlichting  
Deputy Bureau Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 3-C254  
Washington, D.C. 20554

William Kunze  
Chief, Commerical Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 4-C236  
Washington, D.C. 20554

Lauren Kravetz  
Attorney Advisor  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 4-A163  
Washington, D.C. 20554

Paul D'Ari, Chief  
Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W., Room 4-A325  
Washington, D.C. 20554



LaVon E. Stevens